MATTER OF C-E-S- LLC

DATE: DEC. 6, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a strategy consulting firm, seeks to employ the Beneficiary as a senior energy analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on multiple grounds. The Director found that the Petitioner willfully misrepresented a material fact in the labor certification regarding a familial relationship between the Petitioner and the Beneficiary and invalidated the labor certification on that basis. The Director then denied the petition on the ground that it was not supported by a valid labor certification. In addition, the Director found that the Petitioner did not establish that the Beneficiary met the terms of the labor certification – specifically, the experience requirement of five years of qualifying employment – by the priority date.

On appeal the Petitioner asserts that it did not willfully misrepresent any material fact on the labor certification, and that the Beneficiary has the requisite experience to qualify for the proffered position under the terms of the labor certification. The Petitioner requests that the invalidation of the labor certification be reversed and the petition approved.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-

(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

There are two central issues on appeal. The first is whether the Petitioner willfully misrepresented a fact on the labor certification regarding a familial relationship with the Beneficiary which is material to the question of whether the senior energy analyst position was a *bona fide* job opportunity open to all qualified applicants. The second is whether the Beneficiary meets the experience requirement of the labor certification. For the reasons discussed hereinafter, we will affirm the Director's findings on the first issue. However, as the record on appeal demonstrates that the Beneficiary has the experience required by the labor certification, we withdraw the Director's finding to the contrary.[1] A third issue, beyond the decision of the Director, is whether the evidence of record establishes the Petitioner's ability to pay the proffered wage from the priority date[2] of the petition onward.

A. Validity of the Labor Certification

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a petition for advanced degree professional classification generally must be accompanied by an individual labor certification from the Department of Labor. A petition that lacks a required individual labor certification is not considered properly filed. *See id.*

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." A willful misrepresentation of a material fact "made in connection with an application for visa or other documents" is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

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[1] The offered position requires 60 months of experience as a senior energy analyst, or alternatively in a job involving electric power markets operations and economics. The Director found that the Beneficiary had 51 months of qualifying experience based on his job as a research analyst with the Petitioner, but that the Petitioner did not establish the Beneficiary's employment for an additional nine months in that position while working remotely. The Director concluded, therefore, that the Beneficiary did not have the requisite five years of qualifying experience. After reviewing the entire record, including two letters from the Petitioner's project manager attesting to the Beneficiary's employment during the nine-month period in question, and copies of bank statements recording wire transfers of payments from the Petitioner to the Beneficiary during the nine-month time period, we find that the Petitioner has established the Beneficiary's qualifying experience for the minimum of 60 months (five years) required by the labor certification. Accordingly, we will withdraw the Director's finding to the contrary.

[2] The priority date of the petition, in this case August 26, 2013, is the date the underlying labor certification (ETA Form 9089, Application for Permanent Labor Certification) is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

In section C of the labor certification (Employer Information) the Petitioner answered "No" to the following question at C.9:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

In a notice of intent to deny (NOID), however, the Director cited information in the Petitioner's website that the Petitioner's founder and president is the Beneficiary's brother, which contradicted the denial on the labor certification of any familial relationship between the Petitioner and the Beneficiary. The Director requested the submission of evidence to establish that a valid employment relationship existed and that a *bona fide* job opportunity was available to U.S. workers. In response to the NOID the Petitioner submitted a letter from its project manager, [redacted] the signatory of both the labor certification and the Form I-140 petition, who acknowledged the familial relationship between the Petitioner and the Beneficiary and asserted that "the question about familial relationships on the [labor certification] was inadvertently and unintentionally marked incorrectly," [redacted] claimed that there was nevertheless a *bona fide* job opportunity for U.S. workers and submitted documentary evidence of the Petitioner's recruitment efforts. After reviewing the Petitioner's response, the Director found that the Petitioner willfully misrepresented a material fact, invalidated the labor certification, and denied the petition.

On appeal the Petitioner contends that the Director's decision to invalidate the labor certification was incorrect, and that it has demonstrated the *bona fides* of the senior energy analyst position as a job opportunity open to U.S. workers. The Petitioner cites previously submitted evidence that its recruitment efforts included postings at half a dozen sites that produced only one applicant for the proffered position, who was judged unqualified for the job at his interview. The Petitioner asserts that the letter from [redacted] – who conducted the recruitment efforts and described the answer to question C.9 on the labor certification as an "error" that "was unintentional and inadvertent" – shows that there was no fraud or willful misrepresentation by the Petitioner. Moreover, according to the Petitioner it is not clear that the "mismarking" at C.9 of the labor certification is even material considering the lack of evidence that the familial relationship between the Petitioner and the Beneficiary affected the recruitment process conducted by [redacted] or that knowledge of the familial relationship by the DOL would have led to any closer scrutiny during the labor certification process.

The Petitioner's arguments, however, are insufficient to overcome the Director's finding that the Petitioner willfully misrepresented a material fact. A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The

term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

In this case, the Petitioner concedes that the answer to C.9 was a false representation. Furthermore, we find that this misrepresentation was willful. The Petitioner has not submitted evidence that the erroneous denial at C.9 of the labor certification of any familial relationship between the Petitioner and the Beneficiary was "inadvertent" and "unintentional," as claimed by [redacted] is his vague, detail-free letter responding to the NOID. The labor certification was signed by [redacted] on behalf of the Petitioner below a declaration reading:

> I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate.

The declaration of [redacted] that he read and reviewed the labor certification casts doubt on his claim that the wrong answer at C.9 was unintentional and inadvertent. The Petitioner has provided no explanation for how the incorrect answer, if it was indeed a careless mistake, was not caught and corrected by [redacted] or the Petitioner, before the labor certification's filing with the DOL.

We also find the misrepresentation to be material to the Beneficiary's eligibility. The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l). The factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

Among the foregoing factors, at least two apply in this case. The Beneficiary is closely related to the Petitioner's president and sole shareholder (they are siblings), and is one of a small number of employees (which number six, according to the labor certification and the petition). A beneficiary's familial relationship or employment within a small group of employees is an important factor in determining the *bona fides* of a job opportunity. *See* 20 C.F.R. § 656.17(l)(5). Had the DOL been apprised of the familial relationship between the Petitioner's owner/president and the Beneficiary,

and considering the Petitioner's small employee roster, the DOL may have decided to investigate more deeply whether the proffered position of senior energy analyst was a *bona fide* job opportunity open to all qualified applicants. By withholding information about the familial relationship, therefore, the Petitioner may have shut off a line of inquiry by the DOL that was relevant to the Beneficiary's eligibility for the requested classification of advanced degree professional.

Based on the foregoing analysis, we conclude that the Petitioner's answer of "No" to the question at C.9 of the labor certification was a willful misrepresentation of fact because it denied the close familial relationship between the Petitioner's owner/president and the Beneficiary. We also find that the misrepresentation was material to the question of whether the position of senior energy analyst was a *bona fide* job opportunity open to U.S. workers because, while the Petitioner states that only one application was received from an unqualified individual, the DOL may nonetheless have scrutinized the labor certification materials more closely had it been properly informed of the familial relationship between the Petitioner's owner/president and the Beneficiary.

The Petitioner also claims that the regulation at 20 C.F.R. § 656.30[3] does not grant USCIS any authority to invalidate the labor certification because it is a DOL regulation, because it specifies that the invalidation of a labor certification by another agency can only be done in accordance with the procedures of that agency which in the case of USCIS have not been established, and because it requires a finding by that agency of fraud or willful misrepresentation of a material fact which does not exist from USCIS in this case.

The Petitioner is mistaken. The regulation 20 C.F.R. § 656.30(d) specifically grants other agencies (including DHS, the parent agency of USCIS) the authority to invalidate a labor certification previous issued by the DOL. Moreover, the regulation states that another agency may invalidate a labor certification pursuant to a determination "made in accordance with [its] procedures" of fraud or willful misrepresentation of a material fact in the labor certification process. USCIS followed its established procedures by issuing a NOID, in which it advised the Petitioner of its intent to invalidate the labor certification with a finding of fraud or willful misrepresentation of a material fact, explaining the reasons therefor, and to deny the petition. The Petitioner was afforded the opportunity to respond to the NOID, and its response was taken into consideration by the Director in his decision to invalidate the labor certification and deny the petition. Finally, USCIS did make a finding that the Petitioner willfully misrepresented a material fact.[4]

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[3] In its appeal brief, the Petitioner mistakenly identifies this regulation as 20 C.F.R. § 656.20.

[4] In his decision the Director discussed the legal elements of misrepresenting a material fact and, with respect to the facts in this case, stated: "The failure to disclose the fact that the [B]eneficiary was related to the company's president and sole shareholder at the time of the labor certification process was material because it cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment." The Director went on to discuss *Matter of Silver Dragon Chines Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), stating: "A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes *willful* misrepresentation of a material fact and is ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986)." (Emphasis added.) While acknowledging the distinction with the instant petition, in which the Beneficiary is a family member

Accordingly, the Petitioner has not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not reinstate the validity of the labor certification and will not disturb the Director's decision to deny the petition for lack of a valid labor certification.

B. Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. The evidentiary requirements for a petitioner to establish its ability to pay the proffered wage are stated, in pertinent part, as follows:

> Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

Id. Thus, the regulation clearly indicates that for each year since the priority date that a petitioner must establish its ability to pay the proffered wage, at least one type of required evidence – an annual report, or a federal tax return, or an audited financial statement – must be submitted.

The Petitioner states that it has employed the Beneficiary in his current position since January 2013 and has submitted copies of the Forms W-2, Wage and Tax Statements, it issued to the Beneficiary for the years 2013-2016. They show that the Beneficiary's gross pay exceeded the proffered wage in each of these years. As stated by the Director in the NOID, however, the Petitioner must submit one of the three types of evidence required by 8 C.F.R. § 204.5(g)(2) for each year since the priority date. The Petitioner was requested to submit such evidence for each of the years 2013-2016. In response to the NOID the Petitioner submitted a copy of its federal income tax return, Form 1120S, for 2015, but not for the other years requested. Nor was an annual report or an audited financial statement submitted for the other years.

Notwithstanding its submission of the Beneficiary's Forms W-2 for the years 2013-2016, the Petitioner is required by regulation to submit either an annual report, or a federal tax return, or an audited financial statement for each year since the priority date. The Petitioner did not submit any such documents for 2013, 2014, or 2016 in its response to the NOID. In view of the Petitioner's failure to submit at least one type of documentation required by the regulation at 8 C.F.R. § 204.5(g)(2 for each year since the priority date of August 26, 2013, we conclude that the Petitioner

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rather than a shareholder, the Director stated that "the issue is the same as in *Matter of Silver Dragon Chinese Restaurant* – whether the position was truly available to all qualified applicants."

has not established its continuing ability to pay the proffered wage from the priority date onward. For this reason as well the petition is not approvable.

III. CONCLUSION

The Petitioner has not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not disturb the Director's decisions to invalidate the labor certification and deny the petition for lack of a valid labor certification. In addition, we find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of C-E-S- LLC,* ID# 1943213 (AAO Dec. 6, 2018)